

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

NELIDIA BAHENA,

Complainant,

and

**FORTIS RESTAURANT DEVELOPMENT,
INC., d/b/a EL POLLO LOCO and
PEDRO BARRERA,**

Respondent.

**Charge No. 2007CF2513
2007CF2514
ALS No. 08-0175C**

Judge Reva S. Bauch

RECOMMENDED ORDER AND DECISION

A public hearing on damages in this matter was scheduled on September 22, 2009. On September 22, 2009, neither Respondent nor Complainant appeared. Complainant's counsel informed me that although she had diligently attempted to contact Complainant, she was unsuccessful. Complainant's counsel offered her own Declaration as evidence for her client's damages. I declined to accept the Declaration. Thus, Complainant provided no evidence to support her claim for damages. This matter is now ready for a decision.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

The following findings of fact were derived from the record file in this case and the public hearing:

1. On or around March 28, 2007, Complainant filed a Charge of Discrimination against Respondent Pedro Barrera with the Department.

2. On April 23, 2008, Complainant filed a Complaint against Respondent Pedro Barrera with the Commission for sexual harassment.
3. On or around March 28, 2007, Complainant filed a Charge of Discrimination against Respondent Fortis Restaurant Development, Inc., d/b/a El Pollo Loco with the Department.
4. On or around April 23, 2008, Complainant filed a Complaint against Respondent Fortis Restaurant Development, Inc., d/b/a El Pollo Loco with the Commission, alleging sexual harassment, retaliation and constructive discharge.
5. The two Complaints (ALS No. 08-0175 and 08-0176) were consolidated on July 31, 2008 and assigned ALS No. 08-0175C.
6. After being duly served, Respondents failed to appear for the initial status hearing on July 16, 2008.
7. After being duly served, Respondents failed to appear for the second status hearing on September 4, 2008.
8. After being duly served, Respondents failed to appear for the third status hearing on November 6, 2008.
9. Respondents failed to appear, file an answer to the Complaint, or participate in any manner in the proceedings regarding this matter.
10. On December 2, 2008, Complainant filed a Motion for Default.
11. The Motion for Default was served on the Respondents as evidenced by a Certificate of Service filed by Complainant's counsel filed on December 2, 2008.
12. On January 8, 2009, I entered an order granting the Complainant's Motion for Default.
13. My January 8, 2009 order was mailed to the Respondents, but was returned to the Commission with a note stating: "Attempted – Not Known, Unable to Forward."

14. On February 18, 2009, I entered an order setting a public hearing on damages for May 27, 2009.
15. Complainant's counsel filed a Certificate of Service on February 19, 2009 indicating she served my February 18, 2009 order on the Respondents.
16. On May 21, 2009, Complainant's counsel (but not Complainant) appeared for the public hearing, but Respondent failed to appear.
17. On May 21, 2009, Complainant filed a Motion to Continue the Public Hearing on Damages, which I granted.
18. On May 27, 2009, I entered an order rescheduling the public hearing for August 11, 2009.
19. Complainant filed a Certificate of Service with the Commission on May 28, 2009 indicating that she had served a copy of my May 27, 2009 order on Respondents.
20. On July 28, 2009, I entered an order rescheduling the public hearing on this matter to September 22, 2009 due to a scheduling conflict.
21. My July 28, 2009 order mailed to Respondents was returned to the Commission with a note stating: "Return to Sender, Attempted – Not Known, Unable to Forward."
22. On September 22, 2009, Complainant's counsel appeared without Complainant.
23. On September 22, 2009, Respondents failed to appear.
24. Complainant's counsel informed me that she could not locate her client and believed she was in Mexico.
25. Complainant's counsel requested that I admit into evidence her Declaration to support her client's damages case.
26. I declined to admit the counsel's Declaration.
27. There is no evidence on damages in the record.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Act, 775 ILCS 5/1-103(B) and 5/2-101(B).
2. The Commission has jurisdiction over the parties and the subject matter of this case.
3. In accordance with the Default Order entered on January 8, 2009, Respondents are liable for violations of the Act that prohibits sexual harassment, retaliation and constructive discharge.
4. Complainant has the burden of proving damages by a preponderance of the evidence.
5. Complainant failed to introduce any evidence to support her claim of damages.

Discussion

Default

Respondents failed to appear, answer the Complaint or otherwise defend themselves in this matter. Thus, on January 8, 2009, I granted the Complainant's Motion for Default. I recommend that the default against the Respondents be affirmed by the Commission and a finding of liability for sexual harassment be found as to Respondent Pedro Barrera, and sexual harassment, constructive discharge and retaliation be found against Respondent Fortis Restaurant Development, Inc. Once the order of default is entered, the allegations of the complaint are deemed to be admitted. **Payne and Roseland Christian Health Ministries, Inc., IHRC, ALS No. 11591, Jan. 1, 2003.** As a result, a finding of liability against Respondents is appropriate in this case.

Damages

Once liability is found, Complainant then has the burden of proof by a preponderance of the evidence on damages. Since Complainant did not appear, and there is no evidence in the record to support damages, no damages should be awarded.

Recommendation

Although given the opportunity, Complainant failed to produce any evidence in support of her damages case. Therefore, no damages should be awarded.

HUMAN RIGHTS COMMISSION

BY: _____
REVA S. BAUCH
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW DIVISION

ENTERED: October 15, 2009